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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re **Cumulus Broadcasting, Inc.**  
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Serial No. 75/373,773  
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**Sidney R. Brown** of Jones, Day, Reavis & Progue for Cumulus  
Broadcasting, Inc.

Katherine Stoides, Trademark Examining Attorney, Law Office  
**109** (Ronald Sussman, Managing Attorney).  
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Before **Cissel**, Hanak and Hohein, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On October 13, 1997, applicant filed the above-  
referenced application to register the mark "CUMULUS  
BROADCASTING INC." on the Principal Register for "radio  
broadcasting services," in Class 38. The application was  
based on applicant's assertion that it possessed a bona  
fide intention to use the mark in commerce in connection  
with these services.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act on the ground that if applicant were to use the mark it seeks to register in connection with the services specified in the application, applicant's mark so resembles the mark "CUMULUS," which is registered<sup>1</sup> for "production and distribution of television programs and films," that confusion would be likely.

Applicant responded to the refusal to register by arguing that the marks, when viewed in their entireties, are not similar, and that differences between the services with which the marks are used further indicate that confusion would be unlikely.

The Examining Attorney was not persuaded by applicant's arguments. She made of record ten valid and subsisting use-based third-party registrations wherein the services listed include both broadcasting services, in Class 38, and production and distribution of radio and/or television programming, in Class 41. Examples include Registration No. 2,320,131, issued to Jefferson-Pilot Corp., wherein the services include both "television and radio broadcasting services" and "television show production ... distribution of radio, television, cable

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<sup>1</sup> Reg. No. 2,161,282, issued on the Principal Register on June 2, 1998 to Cumulus Distribution Limited Corporation.

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television and video programs to others." Registration No. 2,262,794, issued to WGBH Educational Foundation, lists "broadcasting [of] television and radio" and "production of motion picture films... television and radio series."

Registration No. 2,180,434, issued to Showtime Networks Inc., lists "broadcasting services, namely, ...television, radio, subscription television, television and video broadcasting" in Class 38, as well as "production and distribution of motion pictures," in Class 41.

Registration No. 1,959,126, issued to Reading Eagle Co., lists "television, cable and radio broadcasting" services in Class 38, and "production of information and entertainment programming suitable for television, radio, and print; distribution for others of informational and entertainment programming suitable for television, radio and print media," in Class 41. Registration No. 1,703,991, issued to Viacom International Inc., lists "radio, television and cable television broadcasting services," in Class 38, as well as "production and distribution of movies, television movies, television programs, cable television programming services," in Class 41.

The refusal to register was made final. Applicant timely filed a Notice of Appeal, along with its appeal brief. The Examining Attorney filed her brief on appeal.

Applicant then filed an Amendment to Allege Use, along with specimens of use and a reply brief. The application file was returned to the Examining Attorney for consideration of the amendment. The Examining Attorney accepted applicant's Amendment to Allege Use, and the file was returned to the Board for resumption of action on the appeal. Applicant did not request an oral hearing before the Board.

The issue before the Board in this appeal is whether applicant's use of "CUMULUS BROADCASTING INC." in connection with radio broadcasting services is likely to cause confusion in view of the registration of "CUMULUS" for production and distribution of television programs and films. Based on careful consideration of the record in this application and the arguments of both applicant and the Examining Attorney, we find that the refusal to register under Section 2(d) of the Act is well taken.

Our determination under Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the factors the Court identified as having a bearing on the likelihood of confusion issue in *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and similarities between the goods or services. Federated

Food, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192  
USPQ 24, 29 (CCPA 1976).

In the instant case, the marks are quite similar. Applicant does not even argue in its brief to the contrary. The terms "BROADCASTING" and "INC." have little, if any, source-identifying significance in connection with applicant's services. The term "CUMULUS" is plainly the dominant element in the mark applicant seeks to register, and this word is the cited registered mark in its entirety.

Applicant argues that the services listed in the registration are substantially different from the services specified in the application, that they are sold through different channels of trade to purchasers at different levels of distribution, and are marketed to different customers, who are sophisticated and capable of distinguishing between similar marks. Applicant disagrees with the Examining Attorney's conclusion that the third-party registrations which list both types of services establish that these services are related in such a way that the use of similar marks in connection with them is likely to cause confusion. Applicant argues that third-party registrations issued by the Office establish that similar marks can be used by different entities for both production and distribution of television or film services

and for radio broadcasting services without causing confusion. Several of these registrations were argued, but the registrations themselves were not made of record by applicant.

Additionally, applicant argues that the mediums through which the services are rendered, the cost of the services, and the distribution level of the services are all dissimilar, and that these facts further establish that confusion is not likely.

We readily acknowledge that some of the distinctions applicant draws between the services set forth in the application and the services listed in the cited registration are accurate. These services are not necessarily complementary, nor do they encompass one another. Broadcasting involves different activities than does the production and distribution of television programs and films. Radio broadcasting services are not necessarily always sold to the same people who purchase the registrant's television and film production and distribution services. Some entities undoubtedly provide one of these services without providing the other.

The evidence of record in this appeal establishes, however, that a number of businesses have registered their marks for both types of services. Although third-party

registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, nevertheless, such registrations which individually cover different services, and which are based on use in commerce, have probative value to the extent that they serve to suggest that the listed services are of the type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988); and cases cited therein. Simply put, the third-party registrations made of record by the Examining Attorney establish to our satisfaction that the services in question are related in such a way that use of these two very similar marks in connection with both is likely to cause confusion. Even if it is not clear that the actual purchasers of applicant's services and registrant's services are the same individuals and that these people are likely to be confused by the use of these marks in connection with these services, it is nonetheless reasonable to conclude that in view of the fact that ten third-parties have registered their marks for both types of services, the ordinary consumers who listen to radio broadcasts and who view television and movies would assume, mistakenly as it would turn out to be, that the use of "CUMULUS" and "CUMULUS BROADCASTING INC." in connection

with both services is an indication that they are rendered by a single business. In particular, such viewers and listeners may well believe that registrant has expanded its business and is now offering radio broadcasting services.

With regard to applicant's argument concerning the registration of similar marks to different entities for each of the services at issue here, as noted above, the registrations on which the argument is based were not made of record. Moreover, even if they had been properly introduced into the application record, they would not have persuaded us to reach a different conclusion in this appeal. It is well settled that each case must be decided on its own record and merits, and that neither the Board nor a court is bound by prior determinations by Examining Attorneys that particular marks are registrable. In re Nett Designs, Inc., 57 USPQ2d 1564 (Fed. Cir. 2001).

Additionally, we note that doubt on the issue of likelihood of confusion must be resolved in favor of the prior user and registrant, and against an applicant, who, as the second comer, had a duty to adopt a mark that would not be likely to cause confusion with a mark already in use by another. J & J Snack Foods, 18 USPQ2d 1889, 932 F.2d 1460 (Fed. Cir. 1991).

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DECISION: The refusal to register under Section 2(d)  
of the Act is affirmed.